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All Is Not Lost: The Hidden Defense Benefits of the Supreme Court's Recent Unanimous Ruling on False Claims Act Scienter

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On June 1, the U.S. Supreme Court published a unanimous decision in a False Claims Act (FCA) case, *United States ex rel. Schutte v. SuperValu, Inc.*, No. 21-1326. The opinion, authored by Justice Clarence Thomas, was notable not only for the unanimity of the ideological factions of the Court, but also for its potential impact on future FCA cases. The *SuperValu* decision delivered a clear win for the relators in that case and its companion case, *United States ex rel. Proctor v. Safeway, Inc*., No 22-111. And while the decision has already begun to reverberate across the FCA bar, all is not lost for FCA defendants and defense counsel. Despite ruling in favor of the relators, Justice Thomas's opinion includes language and reasoning that could prove very helpful to defendants in future FCA cases. Indeed, it is not clear that the *SuperValu* holding will deliver consistently similar victories for future relators.

In *SuperValu,* the Supreme Court considered the interpretation of the FCA's scienter requirement, which imposes liability only on a defendant who "knowingly" presents a false claim to the government. Under the FCA, "knowingly" means to act with: (1) actual knowledge; (2) deliberate ignorance; or (3) reckless disregard of the truth or falsity of the claim. In ruling for the relators, the Court held that a defendant can act with the requisite scienter under the FCA, and thus, a defendant could be held liable for an FCA violation if there is sufficient evidence that the defendant believes that its interpretation of a governing legal standard is incorrect — even if the defendant's adopted interpretation is otherwise objectively reasonable. Although the relators prevailed in *SuperValu,* the Supreme Court's affirmation that a defendant's subjective belief controls may actually end up favoring *defendants* in certain circumstances in other FCA cases.

SuperValu, Inc.* and *Safeway, Inc.

Both *Schutte* and *Proctor* were on appeal from the U.S. Court of Appeals for the Seventh Circuit after grants of summary judgment in favor of the defendants were affirmed. These cases stemmed from the same general set of underlying facts: Federal regulations require companies to only charge Medicare and Medicaid their "usual and customary" drug prices when charging the programs for drugs purchased by Medicare and Medicaid insureds. In these cases, the defendant companies had utilized a prescription drug discount pricing program in which customers who paid cash received discounts commensurate with the prices being offered by competitor pharmacies. That prompted the question of whether the "usual and customary" price for SuperValu's and

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Safeway's drugs equaled the discounted price charged to their cash-paying customers or, alternatively, equaled their drugs' higher pre-discount retail prices. Because these companies selected and billed Medicare and Medicaid for the higher pre-discount retail prices, SuperValu and Safeway were alleged to have committed an FCA violation through invoicing improperly high prices, and overbilling Medicare and Medicaid.

The relators in both cases pointed to evidence that SuperValu and Safeway billed Medicare and Medicaid significantly more for particular drugs than the cash-paying customers were charged. In one egregious instance, the billed-back price exceeded the customer's actual price by more than 10 times. In addition, both defendants had received notice from a pharmacy benefits manager (PBM) that their "usual and customary" drug prices were their discounted prices for cash-paying customers, not the higher pre-discounted retail prices. The relators also pointed to evidence that executives at both companies had actual knowledge that their "usual and customary" prices were supposed to be their lowest prices. This evidence included internal emails about defendants' efforts to avoid putting the issue in writing and preventing state agencies and PBMs from learning of the discount programs. As a result, the relators argued that the reimbursement submissions to Medicare and Medicaid were false.

The district court granted summary judgment in favor or SuperValu and Safeway. The court awarded summary judgment, despite evidence that both SuperValu and Safeway had actual knowledge that their claims were false, and despite the court's finding that SuperValu's "usual and customary" prices were their discounted prices. Notwithstanding these facts and findings, the district court granted summary judgment because it found that the defendants' actions were consistent with an objectively reasonable interpretation of the phrase "usual and customary." The district court subordinated the defendants' actual knowledge to an objectively reasonable person standard, essentially holding that as a matter of law a company cannot be liable under the FCA if an objectively reasonable interpretation of an ambiguous regulation supported its submission of the false claims at issue. The district court effectively held that despite submitting claims that were false, and despite knowing that the claims were false, a company cannot be liable under the FCA if its knowing submission of those false claims was, nonetheless, objectively reasonable. The Seventh Circuit affirmed, borrowing heavily from the U.S. Supreme Court's decision in *Safeco*, which interpreted the federal Fair Credit Reporting Act (FCRA) and which the Seventh Circuit read to say that a defendant cannot violate the FCRA if its interpretation of an ambiguous provision of the FCRA accords with an objectively reasonable interpretation of that provision.

The unanimous Supreme Court reversed the grants of summary judgment, holding that "[t]he FCA's scienter element refers to respondents' knowledge and subjective beliefs — not to what an objectively reasonable person may have known or believed." Justice Thomas, writing for the unanimous Court, further expanded on that point, writing that the focus of a scienter analysis is "not, as [the retailers] would have it, on post hoc interpretations that might have rendered their [billing] claims accurate," but rather "on what the defendant knew when presenting the claim." In so holding, the Court put the focus squarely on what FCA claimants *knew at the time* of the claim submission.

On the surface, the Court's ruling in *SuperValu* seems like potential trouble for the FCA defense bar, insofar as it eliminates a potential defense to FCA claims, at least in certain specific circumstances. For that reason, it may cause some defense counsel to rethink their litigation strategy as they gear up for summary judgment motions in current FCA cases that involve arguably ambiguous regulatory requirements. But despite the relators' victory in *SuperValu*, there is reason to believe that such motions could still succeed under the subjective standard. In fact, in many cases, the Court's dicta and reasoning in *SuperValu* may actually prove *beneficial* to the defense's

arguments.

SuperValu was a win for relators for one reason only: The evidence that the companies had *actual knowledge* and a *subjective belief* of the falsity of the claims at the time they were submitted. The Court was unwilling to endorse a rule that would allow companies with actual knowledge or a subjective belief of incorrectness to escape liability just by pointing to an ambiguous regulation and offering an after-the-fact interpretation that justified the claims. But it will not be the case in every FCA case that relators will have evidence that a company actually *knew* its claims were false or had a subjective belief that its legal interpretation was incorrect, yet submitted those claims under that interpretation anyway. Accordingly, the defense bar should have an opportunity to contain *SuperValu* largely to future cases that mirror its own facts.

What is also clear from the Supreme Court's decision is that interpreting arguably ambiguous laws and regulations will remain a significant part of FCA cases, and thus, a powerful arrow in the FCA defense bar's quiver. To be sure, *SuperValu* did not eliminate a defendant's ability to argue that it lacked scienter due to ambiguity in a regulation. To the contrary, in *SuperValu*, the Supreme Court recognized that the "usual and customary" regulation was ambiguous and stated as much several times throughout the opinion. While the Court held that "such facial ambiguity alone is not sufficient to preclude a finding that respondents knew their claims were false," the Court did not suggest that facial ambiguity is irrelevant. Quite the opposite, the Court made clear that the ambiguity could be highly relevant when it noted (emphasis added) that "*it might have been a forgivable mistake* if respondents had honestly read the phrase as referring to retail prices, not discounted prices." The Court therefore made clear that in the absence of proof of actual knowledge of the falsity of the claims, a company's honest (but subsequently determined to be mistaken) reading of an ambiguous regulation can still negate scienter.

Practically speaking, though, it remains to be seen how the *SuperValu* opinion will impact future FCA defendants and FCA relators, particularly in cases where an arguably ambiguous regulation plays a role in the submission of the challenged claims. It is certainly possible that some future FCA defendants may be able to use the Supreme Court's decision to their benefit. If, for example, before it submitted claims to the government, an FCA defendant can show that it actively sought guidance as to whether its submission of those claims was permissible under the applicable regulations, that defendant may be able to successfully argue that those facts foreclose a relator's ability to prove either actual knowledge or deliberate ignorance and should also foreclose a relator's ability to prove reckless disregard. Taking these steps may result in a greater likelihood of success for companies in defending FCA cases.

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